No. 90-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WESTERN STATES PETROLEUM ASSOCIATION;
NATIONAL OCEAN INDUSTRIES ASSOCIATION,
Petitioners,

v.

SONOMA COUNTY, SAN MATEO COUNTY,
MONTEREY COUNTY, SAN LUIS OBISPO COUNTY,
COUNTY OF SANTA CRUZ, CITY AND COUNTY OF
SAN FRANCISCO,
CITY OF MONTEREY, CITY OF MORRO BAY,
CITY OF SAN LUIS OBISPO and CITY OF SANTA CRUZ,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

		Page
I.	PRELIMINARY	1
II.	THE ORDINANCES ARE FINAL LEGISLATIVE ENACTMENTS. NO ADMINISTRATIVE PROCEEDINGS CAN ADDRESS ADEQUATELY THE ISSUES RAISED BY THIS LAWSUIT	3
III.	THE LOCAL ORDINANCES ARE RIPE FOR A CONSTITUTIONAL CHALLENGE	5
IV.	RESPONDENTS INCORRECTLY ARGUE THAT THE CASE IS MOOT	6

TABLE OF AUTHORITIES

CASES: Page

Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 499 (9th Cir. 1980) 4

Doe v. Maher, 793 F.2d 1470, 1490 (9th Cir. 1986), *aff'd*, 494 U.S. 305, 108 S.Ct. 592 (1988) 4

Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 752-57, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976) 6

Lujan v. National Wildlife Federation, —— U.S. ——, 110 S.Ct. 3177 (1990) 5

National Solid Wastes Management Association v. Alabama Department of Environmental Management, 910 F.2d 713 (11th Cir. 1990) 7

Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed. 2d 532 (1974) 6

Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911) 6

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 398-400, 100 S.Ct. 1202, 63 L.Ed. 2d 479 (1980) 6

Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed. 2d 350 (1975) 6

Wilson v. Marana Unified School Dist. No. 6, 735 F.2d 1178, 1181 (9th Cir. 1984) 4

STATUTES

California Public Resources Code
§ 30514 3

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PETITIONERS' REPLY BRIEF

I. PRELIMINARY.

There is a fundamental, underlying question presented in this case: whether states can preclude offshore oil and gas development by the United States by imposing procedural burdens to deny access to the land onshore. From

the Mexican to the Oregon border, respondents, through the local ordinances at issue in this case, seek to construct an unbroken wall to block out offshore oil. One project belonging to several members of petitioner Western States Petroleum Association ("WSPA") has already been defeated by the initiative requirement in the San Luis Obispo County ordinance.

Despite the urgent need for resolution, the primary thrust of respondents' argument—just as it was in the Court of Appeals and the district court—is to avoid a decision in the case. They argue that the case is not ripe; that it is premature; that it is moot; and finally that there is some imaginary administrative remedy. They assert that the San Luis Obispo County election on the San Miguel project was a nullity; that it had no effect on this case; that it is completely "hypothetical" to assume that other projects may meet a similar fate under other ordinances. There is nothing hypothetical, however, about the fact that an election occurred in San Luis Obispo County; that 56 percent of the population voted against the San Miguel project; and that the project as voted on was no longer viable.

There is also nothing hypothetical about the fact that the effect of the Court of Appeals' decision is practically to foreclose challenge of the subject ordinances. That decision effectively holds that possession of a lease is not sufficient to enable a company to challenge these ordinances, even if large amounts of money have been spent on purchase, exploration and development of the lease. A "proposed development" is necessary but, as in the case of the San Miguel project, if a project proponent loses an election and decides to take his project elsewhere, then even that project no longer qualifies as the basis for a challenge. Thus, a full-fledged project which is denied access and is forced to go somewhere else is not enough, but neither is possession of a lease without a project. And, after the election defeat of the San Miguel project

and what that says about other projects being accepted in the San Luis Obispo area, no rational company would propose another project there. The result is that the ordinances will accomplish their objective of closing the door to San Luis Obispo County and its cities and yet will never be subject to challenge.[1]

II. THE ORDINANCES ARE FINAL LEGISLATIVE ENACTMENTS. NO ADMINISTRATIVE PROCEEDINGS CAN ADDRESS ADEQUATELY THE ISSUES RAISED BY THIS LAWSUIT.

Respondents spend a good deal of time arguing that petitioners' Writ should be denied because petitioners failed to exhaust their administrative remedies under state law, particularly the California Coastal Act. Even if there was some requirement under the facts of this case that administrative remedies be exhausted—and we submit there is not—respondents are less than candid to suggest that this truly presents a viable alternative for petitioners in this case. First, the requirement in Cal. Pub. Res. Code § 30514 for California Coastal Commission ("Commission") review of the ordinances before inclusion in the local coastal programs is not enforceable by WSPA. Accordingly, WSPA members have no administrative means to force the local governments to submit any of the local ordinances to review by the Commission. Second, even if the local ordinances are reviewed and approved by the Commission, this has no effect on pipelines and other portions of energy projects located outside the coastal zone.

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[1] The Court of Appeals held that the ordinances of the City of San Luis Obispo and the City of Morro Bay were valid. This, coupled with the election defeat of the San Miguel project, has a significant negative impact on the ability of WSPA members to move forward with onshore facilities for projects in any of the affected areas, including San Luis Obispo County and the cities of San Luis Obispo and Morro Bay. Accordingly, it is appropriate to request a review of both the city and county ordinances at this time.

Third, although the Coastal Act does provide in certain limited circumstances for appeal of denial of permit applications by local governments, respondents themselves admit that these provisions do not cover all of the components of energy projects at issue here and they are, of course, completely irrelevant for ordinances that are not submitted to the Commission and are simply enforced as local law. Finally, even if the Commission overrides a local government and allows siting of a particular facility, that is in no sense a review of the underlying validity of the ordinances challenged here. One project may be allowed to go forward, but the ordinances will still be in effect to block other projects. Thus, resort to the remedies claimed by respondents will merely bypass the issue—unconstitutionality of the ordinances—presented here.[2]

"[E]xhaustion is not required if administrative remedies are inadequate or not efficacious . . . where pursuit of administrative remedies would be a futile gesture . . . [w]here irreparable injury will result unless immediate judicial review is permitted. . . ." *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 499 (9th Cir. 1980) (citations omitted). Where an adequate administrative remedy is unavailable, a litigant need not exhaust an inadequate remedy. *Doe v. Maher*, 793 F.2d 1470, 1490 (9th Cir. 1986), aff'd, 494 U.S. 305, 108 S.Ct. 592 (1988); *Wilson v. Marana Unified School Dist. No. 6*, 735 F.2d 1178, 1181 (9th Cir. 1984). No adequate remedy for the unconstitutional ordinances at issue exists outside of this lawsuit.

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[2] Respondents' own prior admissions cast doubt on their argument here. Footnote 11 of respondents' original brief in support of their motion to dismiss the complaint, at pp. 9-10, states: "Nor do all the defendants in this case agree that their ordinances are subject to Coastal Commission review and override." Clerk's Record (Document No. 21).

III. THE LOCAL ORDINANCES ARE RIPE FOR A CONSTITUTIONAL CHALLENGE.

Respondents argue, as they did in the courts below, that this case is not ripe. But their position, correctly understood, is nothing more than a plea for delay. Thus, respondents attempt to persuade this Court that it is proper to defer review until WSPA's members have spent millions of dollars on purchasing and attempting to develop outer Continental Shelf ("OCS") leases and service facilities before they can determine their rights to develop the onshore support facilities needed to make the projects feasible.[3] Respondents gain a great deal by this. For, to the extent that WSPA's members determine that they cannot risk such huge sums and decide not to proceed—the only prudent course given the result on Shell Oil Company's San Miguel project—the respondents will have achieved their goal of stopping oil and gas development on the OCS, completely insulated from any judicial review of their conduct. It cannot be disputed that the ordinances apply as law today, and all must alter their conduct according to their directions.[4]

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[3] On page 13 of their opposition, respondents assert that the record in the district court demonstrated that ample sites not subject to challenged ordinances still exist along the California coast and that the ordinances were adopted in areas unsuitable for onshore pretroleum facilities. These assertions are unfounded. The supplemental declaration of Douglas Henderson filed January 4, 1988 in support of plaintiffs' motion for partial summary judgment provides detailed testimony that plainly refutes respondents' sweeping assertions. A copy of Mr. Henderson's supplemental declaration is provided as Appendix G filed by petitioners in their Appendix to Petition for Writ of Certiorari. *See* pages 63A-77A of Appendix.

[4] Respondents rely on the recently decided case of *Lujan v. National Wildlife Federation*, —— U.S. ——, 110 S.Ct. 3177 (1990) to support their position that this case is not ripe. However, *Lujan* has nothing to do with land use ordinances like those at issue here. Further, in *Lujan*, the Court found against plaintiff because it had not demonstrated that it was adversely affected by

IV. RESPONDENTS INCORRECTLY ARGUE THAT THE CASE IS MOOT.

Respondents are unable to offer support for the Ninth Circuit's holding that the case as to San Luis Obispo County is moot. They do not dispute the fundamental proposition that a lawsuit is not moot if the problem is capable of repetition. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398-400, 100 S.Ct. 1202, 63 L.Ed. 2d 479 (1980); *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911). Where a case is brought in a representative capacity on behalf of a class or group of plaintiffs, the probability of recurrence is determined by reference to the entire class.[5]

It is alleged in the complaint and not denied that there are outstanding leases in the San Luis Obispo area held by WSPA's members and numerous service companies, represented by the National Ocean Industries Association, who are deprived of the opportunity to work on those leases. The complaint further alleges that discoveries have been made in at least five different units formed out of those leases and that projects are ongoing. It simply cannot be true that the case of the northern counties (where there are no leases) is not moot because of the possibility of lease sales while the controversy as to San

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the challenged agency action. Here, petitioners have clearly established such adversity on the basis of the election defeat of the San Miguel project and the holding of leases by other WSPA members in which development is significantly hampered by the ordinances.

[5] See *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed. 2d 532 (1974) [The Court concluded the case was not moot, because appellant sought to litigate the constitutionality of a state law requirement in a representative capacity]; *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 752-57, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976) [the Court allowed the representative action even where the individual representative had been shown to have no claim].

Luis Obispo is moot even though there are existing leases currently undergoing development.[6]

Respectfully submitted,

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[6] Respondents say little about the Supremacy Clause and Commerce Clause violations alleged here, perhaps because recent case law supports petitioners' position. *See National Solid Wastes Management Association v. Alabama Department of Environmental Management*, 910 F.2d 713 (11th Cir. 1990), where an Alabama statute which prevented commercial waste management facilities from accepting hazardous wastes generated in states other than Alabama was held violative of the Commerce Clause as a potectionist measure. The Court rejected that state's claim that the statute was directed toward a legitimate state concern—assurance of sufficient disposal facilities for the state and minimizing danger to public health by uncontrolled and untreated hazardous wastes coming in from other states—and held, instead, that the statute discriminated among out-of-state waste generators and imposed on these generators the burden of conserving Alabama's remaining hazardous waste disposal capacity. *Id.* at 720. The local ordinances at issue here are similar protectionist measures which seek to isolate coastal communities from the effects of offshore oil development.